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In the Supreme Court of the United States

OCTOBER TERM, 1970

FRANK PETER BALISTRIERI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Frank Peter Balistrieri, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Southern District of Illinois, Southern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix to this Petition (Appendix A). (Appendix B is the order of the Court of Appeals denying rehearing.)

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1971 (Appendix A). Petition for Rehearing was denied by order on February 10, 1971 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where conviction depends upon circumstantial proof in a so-called "net worth" and bank deposit case, where the prosecutor was in possession of information tending to show that the Petitioner's brother was the responsible officer and operator of a tavern corporation, rather than Petitioner, and took affirmative steps to suppress such information, does not his conduct in suppressing such evidence, and in final argument urging the jury to find, on no evidence, that the Petitioner had access to cash receipts of the tavern (the evidence was closed with no proof on this issue which had not arisen in the evidence), should not this Court review the conviction and its affirmance to determine whether the Petitioner was the victim of oppressive and affirmative misconduct by the prosecutor?

2. Where the government was in possession of tax returns showing that profit from certain scrap metal sales which it charged to the Petitioner in a "net worth" case, were actually the profit of other persons, should the circumstantial "net worth" method of proof be accepted?

3. Where the total evidence on the subject of illegal electronic eavesdropping shows that Count 1 of the indictment was tainted by illegally obtained evidence and said count charged conspiracy to commit the acts complained of in Counts 2 and 3, was not the entire indictment so tainted?

4. Does the defendant have a right to an unbiased Grand Jury?

5. Where the government admits unlawful electronic eavesdropping consisting of microphone bugging of the defendant's place of business, the office of one of his attorneys, and the apartment office of his bookkeeper for protracted periods, and leads which culminated in charges contained in one of the counts of the indictment were admittedly obtained thereby, and the government on more than four separate occasions has produced so-called "logs" of illegally overheard conversations, has the government been able to remove the taint of its illegal conduct from the prosecution, since it is by no means certain that the full extent of unlawful electronic eavesdropping has been discovered by the government or disclosed by it, and the original evidence containing the substance of such conversations, to wit, the recording tapes, were destroyed by the government and there only remains editorialized versions of such overhearings?

STATEMENT OF THE CASE

After the original trial before a jury, at which the Petitioner was convicted on Counts 2 and 3 of the indictment charging attempted evasion of income tax by filing of false tax returns, he was sentenced to 2 years' imprisonment and $10,000 fines and costs. (O.D.A.* 76-77)

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* The petitioner has caused four copies of the Defendant's Appendix and copy of Defendant's Exhibit of Excerpts from the Transcript Relating to Electronic Eavesdropping Pursuant to Rule 18(a), which were filed in the petitioner's original appeal in this Court under number 16639, to be filed as exhibits on the second appeal. Citations to these books will be "O.D.A." for Original Defendant's Appendix and "E" for the Excerpts. The Appendix filed on the second appeal was cited as "A".

Upon appeal from that sentence, the Court of Appeals for the Seventh Circuit filed its opinion affirming the judgment at 403 F.2d 472.

Although the Petition for Certiorari was denied, a Petition for Rehearing was granted, and upon this, the Petition for Writ of Certiorari was granted and the judgment of the U. S. Court of Appeals for the Seventh Circuit was vacated. The case was remanded to the United States District Court for the Southern District of Illinois for further proceedings in the light of *Alderman* v. *United States,* 394 U.S. 165, and *Giordano* v. *United States,* 394 U.S. 310. (R. 115-116, A. 6-7)

At the hearing on remand, the Government produced several documents which it stated were purported logs of conversations overheard by illegal eavesdropping. (R. 139, A. 20)

The petitioner moved for a new trial on the ground of new evidence and asked for a new trial in order to avoid a manifest miscarriage of justice and because of the concealment or failure by the United States to produce evidence which would have been favorable to the defense upon the original trial. (R. 118, A. 7) In this connection, a Motion for Production by the United States (R. 125, A. 14) was complied with by the United States, and various Internal Revenue documents were produced by the Government and introduced into evidence. (Defendant's Exhibits 1-5; Government Exhibits 1-5)

The Court found that there was nothing in the new eavesdropping "logs" that tainted the original trial and overruled the motion for new trial and entered judgment and sentence. (R. 132, A. 17)

A short time thereafter, the United States notified the Judge and the defense attorney that additional eavesdropping "logs" and communications had been discovered, and the sentence of the Court was vacated by agreement (R. 136, A. 18), and the Judge, after considering the newly discovered "logs", presented by the Government, decided that they, too, did not taint the original trial, and again overruled the Motion for New Trial and re-entered the judgment and sentence providing for two years' imprisonment and $10,000 fines against the defendant. (R. 138-141, A. 19-22)

Mr. Gimbel, who was the Assistant United States Attorney, argued on behalf of the government to the jury, in part as follows:

> "We have Badger Boxing Club and Tower Tavern, which are also businesses which the Defendant had an interest in at the beginning of the prosecution period and where there's no evidence available to discount that he had an interest at the end of the prosecution period.
>
> "Now, from your experiences in life, ladies and gentlemen, you know how a tavern business operates, it's a cash business, the person comes in and buys a drink and the money goes into the cash register. Certainly in connection with that the business can pay expenses by check and they can pay salaries to employees, but I ask you in your considerations to reflect and determine whether or not a man whose financial identity has been established to be one where there is some 22 to forty-one thousand dollars of difference in his net worth and expenditure picture for the two prosecution years might not have derived that additional money from one of these businesses which he had control over.

"Mr. Walsh: I object to this argument as not being sustained by the evidence, and I move for a mistrial.

"The Court: Overruled. Jury has heard the evidence, they'll decide this case from the evidence, arguments of counsel are not evidence. Proceed." (O.D.A. 228)

There is now uncontroverted evidence that Mr. Gimbel directed the Internal Revenue Service not to proceed with its collection of employees' withholding tax against Peter Balistrieri, the brother of this petitioner. This appears from Defendant's Exhibits 1 and 2, each of which contains a Revenue Officer report of investigation dated January 20, 1964 concerning Tower Tavern, Inc., 716 North 11th Street, Milwaukee 3, Wisconsin, and which shows responsible officers and employees as "Peter Balistrieri, 1640 N. Jackson Street, Milwaukee 2, Wisconsin, amount of penalty recommended, $3,062.93." On Page 2 of said report, there is a purported history of the action, which continues on Page 3 and demonstrates that "Peter Balistrieri had general supervision over the affairs of the corporation", that he signed the tax returns, that he signed the checks, and that he should be assessed.

Following this report, there is a note to the Acting District Director at Milwaukee dated September 2, 1966 stating that referral of Peter Balistrieri's liability was made to the Intelligence Division in February of 1965 and September of 1965, requesting permission to secure waivers to extend statutes. The report further states that on October 14, "a reply was received from the Acting Chief of Intelligence that present instructions received from Franklyn M. Gimbel, Assistant U. S. Attorney, Collection Division, was not to secure waivers". There is a further note that the assessment was made against one of the responsible officers, Peter Balistrieri, for the amount of the trust

fund portion of the tax, and that this was a satellite case to the criminal case of Frank P. Balistrieri pending in the Intelligence Division.

Thus, at the time of his argument as portrayed above, Assistant United States Attorney Gimbel had directed that no action be taken which would disclose the Government's knowledge that Peter Balistrieri was the responsible officer of Tower Tavern, Inc.

This was evidence which could well have affected the jury's conclusion.

Further, in the case at bar, the government relied upon the Midwest Scrap Metal Company income as being the source of the deficiency in income. The petitioner did not show income from this Company on his income tax returns, and thus if there was unlimited income from this source or sufficient income from this source to reasonably account for the increase in net worth, then the element would have been proved. However, in the case at bar, Agent Dyas contended a *tax* deficiency for 1959 of $8,828.34, and a *tax* deficiency for 1960 of $11,752.83 (O.D.A. 175). To prove the source of income which would require the payment of $8,828.34 in tax for 1959, the government offered a gross profit on its Exhibit 468 of $3,071.45. To show a source of income which would cause a tax deficiency for 1960 of $11,752.83, the government offered Exhibit 469 showing a gross profit on sales of scrap metal for that year of $2,163.05 (O.D.A. 175).

The Government's evidence included the charts prepared and testified about by Agent Dyas of the Internal Revenue Service, a claimed expert. He introduced the mentioned two charts purporting to show profits from Midwest Scrap

Metal transactions. Each of these charts was headed, "Frank Peter Balistrieri" with the caption, "Profit on Sales of Scrap Metal for the Year Ended December 31, 1959", Exhibit 468, and Exhibit 469 was similarly labeled for the Year Ended December 31, 1969 (O.D.A. 175). Although the charts themselves show that the payments were to S. Curro by check, the government's accountant assumed that the income was that of Frank Balistrieri. Curro, called to the witness stand for the government out of the presence of the jury, refused to answer the questions of the government and the defense regarding his ownership of the Midwest Scrap Metal under the Fifth Amendment. Of course, his testimony was a nullity and proved nothing.

The total of the profit attributed to Frank Balistrieri, the defendant, for the two years, respectively, was $5,234.50.

The petitioner has secured the production of the income tax returns of Peter F. and Mary Balistrieri, and Jennie Alioto for the calendar year 1961. These returns were introduced at the hearing below with a request for new trial to prevent manifest injustice, as Defendant's Exhibits 4 and 5. The return of Peter F. and Mary Balistrieri, Defendant's Exhibit 4, shows that he reported $2,620.28 as income from "Other Sources" on Schedule B attached to the return, "Sale of Scrap Metal, $2,620.28."

Defendant's Exhibit 5, the income tax return of Jennie Alioto, shows the same amount reported as income from the sales of scrap metal, and each return shows the payment of tax thereof by the respective parties. The evidence

showed that all transactions in Midwest Scrap Metal Co. ended in 1960, according to Agent Dyas. Apparently, then, Jennie Alioto and Peter Balistrieri and his wife were late in recognizing their profit from Midwest Scrap Metal Sales and reported each ½ of the total amount that was charged against Frank P. Balistrieri by Agent Dyas on his conjecture that it was Balistrieri's profit, although his conclusion was largely based upon Jennie Alioto's participation in the transactions and the fact that she was a secretary and bookkeeper for Frank P. Balistrieri. It is now obvious that these facts reported tc the government in the income tax returns, which are Defendant's Exhibits 4 and 5 for the hearing on Motion for New Trial, if taken into consideration by Agent Dyas in his computation and testimony, and reported to the jury and to the Judge, would have cast reasonable doubt on the validity of the only substantially indicated undeclared source of income which was charged against Frank P. Balistrieri, the defendant.

REASONS FOR GRANTING THE WRIT

I.

THE MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE AND TO AVOID A MANIFEST MISCARRIAGE OF JUSTICE, SHOULD HAVE BEEN GRANTED BY THE DISTRICT COURT AND UPON REVIEW BY THE SEVENTH CIRCUIT COURT OF APPEALS. THIS COURT SHOULD REVIEW THE CONVICTION AS AFFECTED BY PURPOSEFUL MISCONDUCT AND CONCEALMENT BY THE PROSECUTOR.

A. The government wrongfully withheld from the defendant, the Court and the jury, evidence of which the prosecutor had actual knowledge, and the prosecutor's misconduct was aggravated by his argument contrary to concealed facts within his knowledge.

At the time of the prosecutor's argument as portrayed above, in the Statement of the Case (O.D.A. 228), Assistant U. S. Attorney Gimbel had directed that no action be taken which would disclose the government's knowledge that Peter Balistrieri was the responsible officer of the Tower Tavern, Inc.

Certainly, if known to the judge, he might have ruled differently upon Gimbel's argument and would have been justified in granting a mistrial for the cumulation of errors by Mr. Gimbel, that is, his acknowledged erroneous conduct in asking over objection and after warning by the

Trial Judge, about convictions of defense witnesses, where he had no knowledge of any such convictions and in fact none existed (O.D.A. 178-179, 185-186, 227).

Brady v. *Maryland,* 373 U.S. 83, and many cases that have followed it, warrant the reversal of this judgment for this apparent wilful withholding of evidence which would have been of assistance to the defense and which, if known to the jury, might have affected its verdict, and indeed no one can say with certainty that it would not have affected the verdict. *Brady* v. *Maryland,* 373 U.S. 83, *Chapman* v. *California,* 386 U.S. 18, 22; *United States* v. *Lookretis,* 398 F.2d 64, C.A. 7, 1968.

B. The inferences to be drawn from newly discovered evidence, known to the government, but not to the Petitioner, would have been favorable to the Petitioner and might reasonably have affected the verdict, to an extent where no one can say with certainty that the verdict would not have been different if the evidence concerning the reported profit from scrap metal sales by Peter F. and Mary Balistrieri and Jennie Alioto for the calendar year 1961 were exposed to the jury and given consideration in Agent Dyas' computations.

See *Brady* v. *Maryland,* 373 U.S. 83; *Chapman* v. *California,* 386 U.S. 18, 22.

In its treatment of the evidence proffered in support of Motion for New Trial on the ground of newly discovered evidence, the Court of Appeals below has somewhat summarily disposed of both claims involved by resort to assumptions.

The Court of Appeals below has failed to recognize that the evidence shows that the Midwest Scrap Metal transactions consisted of a single series of sale of scrap metal in a year in which the petitioner was charged with failure to report income from such transactions. There were no other transactions subsequent to that year, under the evidence, and in fact. The income belatedly reported in the following year by Peter F. Balistrieri and Mary Balistrieri, his wife, joint taxpayers, for about one-half, and Jennie Alioto, a single person, for the other half, and years before this trial, was the return of profit from the transactions charged to the petitioner in the government's prosecution because there were no transactions in sales by Midwest Scrap Metal in the year in which Peter F. Balistrieri and Jennie Alioto reported income.

This Midwest Scrap Metal sales amounts were the only amounts shown by the government's evidence as a possible source of additional income, which had any semblance of substance.

The Court of Appeals overlooked that it is not alone the matter of charging the defendant with $5,000 of income that he did not receive, but on which tax had been paid long before indictment by two other persons, within the government's knowledge, but it is the concealment of this fact from the jury and the Judge which might reasonably well have resulted in a different verdict, that is important. A new trial should have been granted on this evidence alone.

II.

THE GOVERNMENT HAS NOT AND CANNOT PURGE THIS PROSECUTION OF THE TAINT OF UNLAWFUL ELECTRONIC EAVESDROPPING, AND THUS THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND REVERSE THE CONVICTION HEREIN.

> "EXTREME CAUTION MUST BE EXERCISED IN THE USE OF THIS MATERIAL. THIS INFORMATION IS NOT TO BE USED IN THE BODY OF A REPORT EVEN THOUGH PARAPHRASED. IT SHOULD NOT BE USED IN LEAD COVERAGE OR AS THE BASIS OF AN INTERVIEW WITHOUT SPECIFIC CLEARANCE FROM THE BUREAU AND CHICAGO. EVERY EFFORT MUST BE MADE TO FULLY PROTECT THIS SENSITIVE SOURCE."
>
> (Exhibit: "Government Paper 2")

The foregoing quotation from an eavesdropping disclosure demonstrates the attitude of the F.B.I. and the Government with regard to information developed by electronic eavesdropping. It appears on the first page of one of the communications between the Special Agent in Charge in Chicago to the Director of the Federal Bureau of Investigation in Washington, with copies to other field sources, furnished the Court and Petitioner in the hearing on remand below.

It is respectfully submitted by the Petitioner that this attitude is the cause of the partial and piecemeal disclosures of eavesdropping which have caused repeated remands in various cases throughout the nation. It is obvious that such secrecy was maintained over the development of such material, the destruction of the best record, that is, the tape recording, and the transmission of information concerning the eavesdropped material, that it is

impossible to obtain a total truthful discovery and disclosure of the eavesdropping, and that the defendant is unable to demonstrate its extent and substance. The Government has put itself in a posture where it cannot extricate itself from the guilty position of having unlawfully eavesdropped by the use of tape recordings from microphones placed in rooms, and telephone interceptions, and cannot purge itself or prove that its prosecution is free of taint. To place this impossible burden on the defendant is contrary to the theory of the law which holds that where the government becomes custodian of evidence for its own benefit, it is its duty to keep the evidence in such a manner that it will be available for use upon trial by all parties, *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 570.

In the case at bar, it has been substantially conceded by the United States that it could not proceed upon the conspiracy count returned, which was Count 1 of the indictment herein, because certain of the overt acts charged unquestionably had their basis in unlawful electronic eavesdropping. These matters are reflected in Paragraph 10 of Count 1 of the indictment as follows:

> "It was part of said conspiracy to deprive the United States of its right to and interest in the conscientious, faithful, disinterested, unbiased and honest services of duly appointed employees of the Internal Revenue Service." (R. 5, O.D.A. 26)

This allegation was based upon evidence obtained by electronic eavesdropping by then F.B.I. Agent John A. Holzman.

If the evidence admittedly tainted by having been the result of a lead obtained from electronic eavesdropping, was such as to cause the Grand Jury to charge that the Petitioner Balistrieri had conspired to deprive the United States of the honest services of duly appointed employees

of the Internal Revenue Service, then that Grand Jury was biased and prejudiced against Balistrieri in its consideration of whether he had attempted to defeat the Government tax collections by filing a fraudulent return. It is inconceivable that anyone would believe that a Grand Jury could give fair consideration to the tax fraud charges where it was indicated to it as a result of electronic eavesdropping that the Petitioner had attempted to influence Treasury Agents so that they would not give honest service to the Government in connection with a conspiracy to defeat the taxpayer-defendant's income taxes.

Jennie Alioto was the alleged co-conspirator with the defendant in Count 1 of the indictment. It was proved that by unlawful electronic eavesdropping, Jennie Alioto had been heard to indicate that she had forged signatures on certain business and tax documents in connection with the Petitioner Balistrieri's business.

Can it be said that this Grand Jury now was unaffected concerning the Petitioner Balistrieri, and the charge of his attempted tax invasion contained in Counts 2 and 3 of the indictment? The real question for the Court is whether the Government has purged itself of the taint of unlawfulness from its surreptitious activity in eavesdropping which consisted of both wiretapping, that is, telephone interception, and the planting of bugs or microphones after unlawful entry into rooms of prospective defendants, and transmission of conversations overheard by the microphones to F.B.I. Agents in other rooms or over telephone wires to their office. Does the Court have full disclosure? After this case was affirmed once by the Court of Appeals and Certiorari denied by the Supreme Court, the Solicitor General discovered there was more eavesdropping. True, this material apparently does not bear upon any charge of tax evasion. The question the Petitioner presents to the

Government and the Court is that there has been no adequate showing that this is the total of the eavesdropping, or that the evidence presented on trial is untainted.

The evidence presented to the Grand Jury was tainted as is demonstrated by the dismissal of Count 1 (R. 142, A. 5), which contained overt acts and charges clearly and admittedly based upon eavesdropping. Did not Counts 2 and 3 suffer the same defects of origin from a biased grand jury?

It is very apparent that it cannot be said with certainty that there is not more unlawful electronic eavesdropping product lying in the possession of the government, indeed its Department of Justice.

The destruction of real evidence which would disclose the truth concerning eavesdropping, that is, the tapes, justifies this Court in exercising its supervisory power over the administration of justice by reversing the conviction. *Kyle* v. *United States,* 297 F.2d 507, 511. The origin of the prosecution by presentation of tainted evidence which probably caused the charges in all three counts invalidates the indictment.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18223

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

FRANK PETER BALISTRIERI,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois, Southern Division

January 14, 1971

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and PELL, *Circuit Judge.*

CASTLE, *Senior Circuit Judge*: Defendant-appellant, Frank Peter Balistrieri, was convicted following a jury trial on two counts of an indictment charging him with income tax evasion for the years 1959 and 1960 by filing false and fraudulent returns in violation of 26 U.S.C.A. §7201. He was fined $5,000 on each count and was sentenced to two concurrent two-year prison terms. On appeal this Court affirmed. *United States* v. *Balistrieri,* 7 Cir.,

403 F. 2d 472. The Supreme Court initially denied certiorari (394 U.S. 985). In response to a petition for rehearing filed by the appellant, which petition asserted that there may have been illegal electronic eavesdropping of appellant's conversations on premises at 645 North Michigan Avenue, Chicago, Illinois, the Solicitor General stated that after investigation it had been determined that appellant was overheard during the course of an electronic surveillance of those premises, and suggested that the case be remanded to the District Court for further proceedings. The Supreme Court granted the petition for rehearing, vacated its order denying certiorari, vacated the judgment of this Court, and remanded the case to the District Court for further proceedings in the light of *Alderman* v. *United States,* 394 U.S. 165 and *Giordano* v. *United States,* 394 U.S. 310 (395 U.S. 710).

Subsequent to the remand by the Supreme Court but prior to the District Court hearing conducted pursuant thereto, the appellant filed a motion for a new trial based on allegedly newly discovered evidence favorable to the appellant which it is asserted the prosecution concealed or failed to produce although its existence was known to the government.

After a hearing on both phases of the matter, and the making and entering of findings of fact and conclusions of law, the District Court denied the motion for a new trial; concluded that the appellant's conviction was not tainted by evidence or other fruits stemming from the unlawful surveillance conducted while he was present and participated in a conversation at 645 North Michigan Avenue, Chicago, Illinois, on January 13, 1965; and entered a new final judgment of conviction and sentence, reimposing the original fines and concurrent two-year prison terms.

The record discloses that during the period between October 2, 1964 and April 17, 1965 the government conducted an unlawful electronic surveillance of certain premises located at 645 North Michigan Avenue, Chicago, Illinois. The court examined, *in camera,* the logs relating to this surveillance and found that they reflect that during the entire period thereof the appellant was present on only one occasion, i.e., January 13, 1965. The court also examined, *in camera,* the complete "airtel" relating to the surveillance on January 13, 1965. The portion of the log for January 13, 1965 which reflects the appellant's overheard conversation, and the portion of the "airtel" dated February 12, 1965 which relates to such conversation, were made available to the appellant.

The appellant does not urge that he is entitled to a new trial because of the January 13, 1965 overhearing. He concedes that "this material apparently does not bear upon any charge of tax evasion." What appellant does contend with respect to the unlawful eavesdropping issue is that because of the nature of the government's activities and conduct in the premises this Court in the exercise of its supervisory power over the administration of criminal justice in the federal courts should reverse appellant's conviction and dismiss the indictment. In this connection the appellant seeks to impeach the integrity of the government's representation that it has now made a full and complete disclosure of all of its unlawful eavesdropping conducted against appellant. To this end appellant points to the government's re-use of the tapes used to record the unlawfully overheard conversation, with the result that the government has thereby made unavailable the best evidence of what was actually overheard. He contends that this, coupled with what he characterizes as a partial and edited version of the overhearing represented by the por-

tion of the log and the portion of the "airtel" to which he was given access, and the piecemeal disclosures of the eavesdropping, demonstrates that there has been no adequate showing on the part of the government that this is the total of the eavesdropping and that the evidence presented on trial is untainted. We disagree.

Appellant's argument based on the erasure of the original tape recording of overhearings by re-use of the tapes after logs had been prepared therefrom was also made on the earlier appeal herein, and it was rejected by this Court. *United States* v. *Balistrieri*, 7 Cir., 403 F. 2d 472, 476-477. Such an argument was again rejected in *United States* v. *Mirro*, 7 Cir., ... F. 2d ..... (No. 18158, Opinion filed December 15, 1970) where the following observation, here pertinent, was made:

> "Neither does the fact that the original tapes were destroyed render the available evidence on the transcribed logs inadequate. It is the general practice of the F.B.I. to use logs rather than tapes in its investigations. The tapes are usually erased or destroyed after their transcription into logs. There was no evidence at the hearing that this method of transcription lacked authenticity."

And, the additional consideration to which appellant makes reference — the piecemeal disclosures[1] — attests to the government's sincerity in making a full and complete disclosure rather than an attempt to frustrate appellant in obtaining a total truthful discovery of the extent and

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[1] This appeal involves a disclosure of an instance of unlawful electronic eavesdropping additional to that which had been disclosed at the commencement of the trial in which appellant was convicted, and which was considered by this Court on the earlier appeal (403 F. 2d 472, 474-475 and 476-477).

substance of unlawful eavesdropping with respect to which he has standing to object. Moreover, when the Supreme Court remanded this case for further proceedings in the light of *Alderman* and *Giordano* it did not, in our judgment, extend an invitation to the District Court, or to this Court, to fashion and apply a more drastic remedy — reversal of conviction and dismissal of the indictment — for unlawful eavesdropping. As we observed in *United States* v. *Mirro, supra,* "We are bound to follow . . . and will not expand . . . " *Alderman* and *Giordano.*

We turn to consideration of appellant's contention that the District Court's denial of his motion for a new trial requires the reversal of his conviction. Motions for new trial are addressed to the sound discretion of the trial judge. *United States* v. *Bruni,* 7 Cir., 359 F. 2d 802, 806. Our review of the exercise of that discretion is a limited one. *United States* v. *Bolden,* 7 Cir., 355 F. 2d 453, 459. Absent a clear showing of abuse of discretion, the action of the trial judge in determining the probable effect of newly discovered evidence in changing the result of the trial must stand. *Cf. United States* v. *Lewis,* 6 Cir., 338 F. 2d 137, 139.

In the trial which culminated in appellant's conviction of income tax evasion the government presented its case on the "net worth theory". The three most likely sources of unreported taxable income for the years involved as disclosed by the evidence adduced, pointed to by the prosecutor in argument to the jury, and relied upon by this Court in affirming the appellant's conviction, are Hotel Roosevelt, Inc., Ben-Kay, Inc.— both tavern enterprises — and Midwest Scrap Metal Company. In *United States* v. *Balistrieri,* 7 Cir., 403 F. 2d 472, 480, we said in this connection:

> "As a final attack on the denial of the motion for acquittal at the close of the Government's evidence, defendant contends that the prosecution failed to prove that the increases in net worth arose from taxable sources. However, the Government fulfilled its burden under the net worth method by: (a) giving defendant credit for all loans and for the proceeds of a life insurance policy received in 1958; (b) proving that the increases did not arise from gifts or inheritance; and proving three 'likely' sources of taxable income—Hotel Roosevelt, Inc., Ben-Kay, Inc., and Midwest Scrap Metal Company. In Holland v. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 136, 99 L.Ed. 150 (1954), the Court held that '[i]ncreases in net worth, standing alone, cannot be assumed to be attributable to current taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.' Cf. United States v. Mackey, 345 F.2d 499, 507 (7th Cir. 1965). The record, therefore, clearly indicates that the evidence presented to the jury was sufficient to support its verdict."

Appellant operated and served as president of Hotel Roosevelt, Inc. and Ben-Kay, Inc. Another business in which the appellant had a substantial interest was Tower Tavern. Like Hotel Roosevelt, Inc. and Ben-Kay, Inc. it also was a tavern business. In his summation to the jury the prosecutor after pointing to other likely sources of unreported income, including the three primary likely sources to which we have made reference, referred also to Tower Tavern. He observed that the tavern business is a cash business and argued to the effect that unreported income might have been derived from one of these businesses.

The evidence which appellant asserts is newly discovered and which he claims the prosecution concealed or failed to produce, although its existence was known to the government at the time of the trial, falls into two categories.

The first category is evidence, acquired by the government in the course of an investigation with respect to unpaid employee withholding tax due from Tower Tavern, that Peter F. Balistrieri, a brother of the appellant, was the operator of Tower Tavern, the responsible officer of that corporation, and had general supervision over its affairs. Insofar as the appellant is concerned the facts with respect to the actual operation of Tower Tavern can hardly be regarded as newly discovered evidence. He had a substantial interest in Tower Tavern. It would strain credulity to assume that he did not know the business was actually operated by his brother, rather than himself. Moreover, that fact would in no way foreclose the likelihood that the business could have been a source of unreported income to the appellant. Thus, the evidence with respect to the operation of Tower Tavern neither qualifies as newly discovered evidence which warrants consideration on a motion for a new trial, nor does it possess any probative value which might change the result of the trial.

The second category of evidence relied upon by the appellant in connection with his motion for a new trial relates to information contained in the income tax returns for the year 1961 filed by Peter F. Balistrieri,[2] appellant's brother, and by Jennie Alioto, appellant's bookkeeper and sister-in-law. These returns disclose that each of these taxpayers reported 1961 income received from Midwest Scrap Metal Company. The amounts so reported when combined approximately equal the amount of net profit from Midwest which the government's trial evidence indicates was the annual amount of unreported income received by appellant from Midwest in the years 1959 and 1960.

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[2] This return was filed jointly by Peter F. Balistrieri and Mary Balistrieri.

There was evidence at trial showing that appellant was sole owner of Midwest in 1959 and 1960, the only tax years involved. The disposition made of Midwest's receipts in 1961 does not, on the record before us, bear such relevance to the likelihood of Midwest having been a source of unreported income received by the appellant in 1959 and 1960, that the probable effect of this tax return evidence would be to change the result of the trial. This is especially so in view of evidence contained in the record with respect to alternative likely sources of unreported income.

We perceive no basis for concluding that the District Court's denial of the motion for new trial constituted an abuse of discretion.

In view of the foregoing, the judgment order appealed from is affirmed.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, February 10, 1971

Before

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. LATHAM CASTLE, *Senior Circuit Judge*

HON. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18223 vs.

FRANK PETER BALISTRIERI,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois, Southern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by defendant-appellant in the above entitled cause, be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1455

FRANK PETER BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-8) was entered on January 14, 1971, and a petition for rehearing was denied on February 10, 1971 (Pet. App. 9). The petition for a writ of certiorari was filed on March 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the fact of illegal electronic surveillance requires dismissal of all counts of an indictment although possible use of tainted evidence before the grand jury appears only as to one count of the indictment.

2. Whether petitioner was entitled to a new trial on the basis of alleged newly discovered evidence.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C., See 7201), provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

This is the second time this case has been before this Court. In 1967, Petitioner was convicted by a jury on Counts II and III of a three-count indictment. Those counts charged petitioner with having willfully attempted to evade and defeat his income tax for the years 1959 and 1960 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal

Revenue Code of 1954 (O.D.A. 23-45).[1] The government had elected not to proceed on the first count of the indictment after proceedings to suppress information held before trial made it appear that that count, charging a conspiracy to defraud, might have been tainted by illegal electronic surveillance. Petitioner was fined $5,000 on each count and sentenced to concurrent two-year prison terms (O.D.A. 15-16). The government's proof was by the net worth-expenditures method.

Petitioner's first appeal was predominantly concerned with assertions that his conviction had been tainted by the illegal surveillance. The court below affirmed his conviction and this Court denied review. *United States* v. *Balistrieri,* 403 F. 2d 472 (C.A. 7), certiorari denied, 394 U.S. 985. Petitioner then filed a petition for rehearing suggesting that there may have been additional illegal electronic eavesdropping of one or more of his conversations at premises different from those involved in the suppression proceedings preceding his trial. The United States stated in response that after investigation it had been determined that petitioner was "overheard during the course of an electronic surveillance of the premises at 645 North Michigan Avenue," and suggested that the case be remanded to the district court for further proceedings.

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[1] The designation "O.D.A." refers to the original Defendant's Appendix in *Frank Peter Balistrieri* v. *United States,* No. 1070, October Term, 1968. The designation "O.G.A." refers to the original Government's Appendix in the same case. The designation "App." refers to the Appendix in the court below on the present appeal.

The Court adopted this suggestion, remanding to the district court for further proceedings in light of *Alderman* v. *United States,* 394 U.S. 165, and *Giordano* v. *United States,* 394 U.S. 310. 395 U.S. 710.

Petitioner then filed an independent motion for new trial in the district court on the ground of newly discovered evidence unrelated to the surveillance issues (App. 7-11). This motion for a new trial was denied (App. 22). Petitioner also filed a motion for the production of the documents relating to the electronic surveillance. The government then produced Government Paper No. 2, a six-page "Airtel" dated February 12, 1965, reflecting a conversation involving petitioner overheard as a result of electronic surveillance of 645 North Michigan Avenue on January 13, 1965. After appropriate hearings, the district court found (App. 21-22):

1. That the government conducted unlawful electronic surveillance of certain premises located at 645 North Michigan Avenue, Chicago, between October 2, 1964, and April 17, 1965.

2. That petitioner's conviction was not tainted by the use of evidence obtained as a result of the surveillance of January 13, 1965, when he was present and participated in a conversation at 645 North Michigan Avenue, and, further, that neither this conversation nor any fruits derived from it was proffered by the government during the trial or used by it in cross-examination of any witnesses proffered by petitioner.

3. That petitioner was present at 645 North Michigan

Avenue only once, *i.e.*, January 13, 1965, during the entire period of time the surveillance was in operation.

4. That the portion of the "Airtel" dated February 12, 1965, relating to petitioner's conversation of January 13, 1965, had been made available to him.

The court concluded "that the motion for new trial should be and the same hereby is denied; the Court further finds that no taint having permeated the conviction of defendant a new final judgment of conviction based on the existing record as supplemented by its further findings shall be entered." (App. 22.) Accordingly, a new judgment and commitment imposing the same penalties as those originally imposed was filed. The court of appeals affirmed.

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 13-14) that the government has not sustained its burden of showing that its trial evidence was free of taint. Petitioner concedes that the electronic surveillance at 645 North Michigan Avenue, which caused the remand of this case by this Court, "apparently does not bear upon any charge of tax evasion" (Pet. 15). His present argument is thus merely a restatement of the arguments which the court of appeals and this Court rejected on his first appeal. In affirming the petitioner's conviction on the first appeal in 1968, the court below stated (403 F.2d at 476-477):

> We hold that the evidence relating to Midwest was not "come at by exploitation" of the information obtained in the illegal searches and seizures,

but "by means sufficiently distinguishable to be purged of the primary taint."

We reach the same conclusion regarding the evidence allegedly obtained by the illegal eavesdropping. The Government met its burden in proving that its evidence was free from this taint by disclosing to the court and the defendant all information in the Government's possession, including summaries of the tapes which had been erased in the ordinary course of re-use, undestroyed tapes, and by making available the agents who participated in the eavesdropping. The district court ordered suppressed all the information obtained as the result of the electronic surveillances and the searches and seizures and all leads developed therefrom. Defendant contends, however, that the Government failed to meet its burden since it had destroyed the best evidence of what had been heard through erasure of the recordings on some of the tapes by their re-use. However, the Government tendered proof to the district court showing independent sources for the leads to each of the items of evidence introduced at trial. The trial judge displayed a high degree of prudence and deliberation in hearing extensive testimony from each side before concluding that the evidence offered by the Government was free from taint. We agree with his conclusion.

After its further review in connection with this second appeal by petitioner, the court below again came to the same conclusions (Pet. App. 3-5), citing *United*

States v. *Mirro,* 435 F. 2d 839, 841 (C.A. 7) (Pet. App. 4-5), and expressing the view that what petitioner termed the government's "piecemeal disclosures" of electronic surveillance actually "attests to the government's sincerity in making a full and complete disclosure rather than an attempt to frustrate * * *" petitioner's efforts to obtain complete discovery of unlawful eavesdropping (Pet. App. 4).

Since both courts below have twice satisfied themselves, by exhaustive review of the facts in the record, that petitioner's trial for tax evasion was not affected, directly or indirectly, by any illegally obtained evidence, and since the electronic surveillance which resulted in this Court's remand is now conceded to have no apparent bearing on the case, we submit that there is no occasion for further review.

2. Even assuming tainted evidence was used in obtaining the indictment on the dismissed conspiracy count (Count I), an assumption never proved true, petitioner was not entitled to have the substantive counts of the indictment dismissed. The conspiracy count itself could not have been dismissed on this basis, for a count of an indictment is not invalidated merely because tainted evidence has been presented to the grand jury in obtaining it. *Lawn* v. *United States,* 355 U.S. 339, 349-350; *Holt* v. *United States,* 218 U.S. 245, 247-248. *A fortiori,* one count of a multi-count indictment is unaffected by the use of tainted evidence in obtaining the indictment on some other count. As the court below stated in rejecting petitioner's identical contention on his first appeal (403 F. 2d at 477):

> Defendant's contention that the eavesdropping evidence used to obtain Count I of the indictment was prejudicial as to him affords no basis for reversal since he was never prosecuted on the first count. An illegal search and seizure "does not serve to immunize" the defendant from prosecution. *United States* v. *Ruffin*, 389 F. 2d 76, 79 (7th Cir. 1968); *United States* v. *Hoffman*, 385 F. 2d 501, 503-504 (7th Cir. 1967.

3. Petitioner's argument for a new trial on the ground of alleged newly discovered evidence presents no issue warranting further review. As the court of appeals found, the evidence was not newly discovered, and the suggestion that the prosecution suppressed evidence depends on a distortion of context and of the use to which the government put the relationship in issue (App. 6-8).

In particular, there can be no doubt that petitioner knew that his brother operated Tower Tavern, and the government never claimed that petitioner operated it. But petitioner had a substantial investment in the enterprise, and so it was reasonable to suggest it as one possible secondary source of unreported income. The quotation from the prosecutor's summation (Pet. 5) is taken out of context to make it appear that the government relied upon Tower Tavern as a major likely source of the net worth increases; but when the preceding paragraph is read (O.D.A. 227-228) it will be seen that the prosecutor was relying mainly upon the other taverns, Hotel Roosevelt and Ben-Kay, both of which petitioner personally operated during the years in ques-

tion. The contentions of newly discovered evidence regarding income tax returns filed by petitioner's sister-in-law, Jennie Alioto, and brother, Peter Balistrieri, at about the time the government's investigation of petitioner's tax matters began are equally frivolous.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APRIL 1971.

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